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# THE HUSBAND-WIFE MARITAL PRIVILEGES UNDER MRE 504: A BALANCING OF PUBLIC POLICY CONSIDERATIONS.

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, The United States Army, or any other governmental agency.

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# THE HUSBAND-WIFE MARITAL PRIVILEGES UNDER MRE 504: A BALANCING OF PUBLIC POLICY CONSIDERATIONS.

by Captain Bobby D. Melvin

ABSTRACT: This thesis examines the Husband-Wife marital privileges as they exist in the military legal system under Military Rule of Evidence 504. The privileges are not mandated by the Constitution, rather they exist because they serve the public policy of promoting the marital relationship which must be balanced against achieving the interests of justice. This thesis concludes that M.R.E. 504 provides adequate protection for the competing interests, but that the current application of the privileges to extrajudicial proceedings is overbroad.

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THE HUSBAND-WIFE MARITAL PRIVILEGES UNDER MILITARY RULE OF EVIDENCE 504: A BALANCING OF PUBLIC POLICY CONSIDERATIONS.

## I. INTRODUCTION.

> "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice. When such a rule is the product of a conceptualism long ago discarded, is universally criticized by scholars, and has been qualified or abandoned in many jurisdictions, it should receive the most careful scrutiny."[1]

This statement is especially true of the Husband-Wife marital privileges.[2] The military justice system specifically recognizes two privileges derived from the marital relationship in Military Rule of Evidence 504.[3] These two privileges - the privilege of a witness not to testify against his or her spouse (spousal incapacity) and the privilege of spouses not to have their confidential communications disclosed - often exist in many of the criminal cases within the military justice system, but are seldom raised, or even considered, by either defense or government counsel.[4] One purpose of this paper is, by identifying these oft forgotten and more often misunderstood privileges and the various situations where they may apply under M.R.E. 504, to assist the personnel involved in the administration of the military justice system in giving the marital privileges the consideration they deserve.

The paper will focus on the history, current status, policy considerations, and future impact in the military justice system of the marital privileges under M.R.E. 504.[5] It will show that despite the intent, M.R.E. 504 fails to achieve the "certainty and stability" in the application of the marital privileges that is deemed necessary for the military justice system,[6] but that the reason for the failure lies in the complex nature of the marital privileges and the resultant difficulty in their application, not in the rule. The paper concludes that the marital privileges are not absolute - they must yield when the interest in the due administration of justice outweighs the interests to be served by applying the privileges[7]. Additionally, M.R.E. 504 should only apply at judicial proceedings where, on a case-by-case basis, the Military courts can determine this balance by "interpreting and applying those federal common law principles which (are), in light of reason and experience, most compatible with the unique needs of military due process"[8].

The first section of the paper examines the historical development of the marital privileges. Because the two marital privileges recognized in M.R.E. 504(a) and 504(b) are distinct privileges which developed along different bases, they are examined separately.[9] The analysis begins by briefly reviewing the general development of the privileges at common law, in the federal system and in the military system. The second section of the paper examines the scope of the marital privileges under M.R.E. 504, as interpreted and supplemented by the military courts, and looks at how the rule is being applied in the military justice

system. The paper concludes that M.R.E. 504 adequately protects the policy considerations which justify the marital privileges, but that the unique needs of the military justice system would be better served if the rule were applied only at judicial proceedings.

## II. The Historical Development of the Marital Privileges.

### A. The Spousal Incapacity Privilege (M.R.E. 504(a)).

#### 1. Common Law Origins.

The privilege not to testify against one's spouse developed at common law and has existed in some form for over four hundred years.[10] That it existed was easy to determine, why it existed was not so obvious.[11] It is generally accepted that the privilege developed out of the rule of spousal incompetency. At common law, parties in an action were considered incompetent as witnesses because, due to their direct pecuniary or proprietary interest, there was too strong a motive for misstatement.[12]

Also prevalent at common law was the legal fiction that husband and wife were one entity. As Lord Coke noted in 1628:

> "...it hath beene resolved by the Justices that a wife cannot be produced either against or for her husband, quia sunt duae animae in carne una,..."[13]

Since husband and wife were considered one entity, the

logical conclusion was that if either spouse was a party in interest, so was the other. Consequently, both were incompetent to testify in any proceeding involving either as a party.[14]

Although the rule of disqualification for interest was eventually abandoned[15], the spousal incapacity privilege remained firmly entrenched in the legal system, with the common law courts finding different rationale[16] to support the existence of the privilege.[17] Of these arguments, the one most often cited in modern opinions as justification for the privilege is that it is necessary to preserve marital harmony.[18]

2. Development of the Spousal Incapacity Privilege in the Federal Courts.

In the United States, the existence of the privilege at common law was never seriously questioned.[19] The primary rationale supporting the spousal incapacity privilege and, initially, the rule of spousal incompetency, was the belief that public policy required these rules to protect the marital relationship.[20]

The spousal incompetency rule prohibiting a spouse from testifying for the other was abolished in most States by 1900.[21] However, it disappeared much slower in the federal system.[22] It was not until the 1933 case of Funk v. United States[23] that it was finally abolished.

In Funk, the Supreme Court accepted the modern trend allowing spousal testimony noting that the "public policy of one generation may not, under changed conditions, be the public policy of another"[24]. After

rejecting the argument that admission of a spouse's testimony was against public policy,[25] the Court concluded "it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule."[26]

Although the Court was willing to allow a witness spouse to testify on behalf of a defendant spouse, Funk did not affect the ability of a defendant to prevent his or her spouse from giving adverse testimony, even though some lower courts believed public policy also supported a change in this rule.[27] The Court did not address this issue until 1958.[28]

In Hawkins v. United States,[29] the accused was charged with violating the Mann Act[30] after transporting a girl from from Arkansas to Oklahoma to have her engage in prostitution.[31] Despite his objection, the district court allowed the girl, who had since become the accused's wife, to testify against him.[32] The Supreme Court adopted the common law rationale that the privilege is necessary because it fosters family peace[33] and held that one spouse was barred from testifying against the other unless both consented.[34]

Although the Court was unwilling to find that the reasons for the adverse testimony rule were no longer valid, it did recognize that the privilege was subject to later modification. Justice Black voiced this recognition for the Court stating "this decision does not foreclose whatever changes in the rule may eventually be dictated by 'reason and experience'[35]".[36]

In his concurring opinion, Justice Stewart

identified the need for "establishing a continuing body to study and recommend uniform rules of evidence for the federal courts."[37] This need must have been recognized by Congress because that same year it passed legislation authorizing the Chief Justice of the United States to appoint the Advisory Committee on Rules of Evidence to formulate uniform rules of evidence for the United States District Courts.[38]

The Advisory Committee was appointed in 1965 and the initial draft of the proposed uniform rules was completed in 1969.[39] Section V of these rules contained proposed enumerated privileges.[40] The marital privilege set forth in Proposed Rule 505 provided simply that "An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him."[41] This rule, slightly modified in the revised draft[42], was included in the proposed rules adopted by the Supreme Court[43], but rejected by Congress.[44] Instead, Congress replaced the rule with specific enumerated privileges with a general rule on privileges when it enacted the Federal Rules of Evidence in 1975.[45]

In the Federal Rules of Evidence, Congress returned to Justice Black's "reason and experience"[46] concept with F.R.E. 501 providing that "the privilege of a witness,... shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."[47] The substitution of F.R.E. 501 for the thirteen specific privilege rules previously proposed in the rules adopted by the Supreme Court,[48] returned the spousal incapacity privilege to the Hawkins rule[49] where, except for a few exceptions the Court adopted[50],

it remained unchanged until 1980.[51]

In Trammel v. United States,[52] the Court again addressed the marital privilege issue, this time to decide whether an accused could invoke the privilege against adverse spousal testimony so as to exclude the voluntary testimony of his wife.[53] Otis Trammel, along with two others, was charged with importing heroin into the United States.[54] His wife, Elizabeth, was an unindicted co-conspirator who agreed to testify against her husband under a grant of use immunity.[55]

At trial, the defendant objected to his wife's testimony asserting that under Hawkins, he had a privilege against the adverse testimony of his wife.[56] The trial court, however, allowed her testimony[57] and the Tenth Circuit upheld the ruling.[58] The Supreme Court affirmed the lower courts' decisions modifying the Hawkins rule "so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying".[59]

Trammel's modification represents the privilege against adverse spousal testimony as it currently exists in the federal court system. For any future changes in the marital privileges that may be dictated by changes in public policy, the methodology the Court used in reaching its decision to modify the privilege is just as important as the modification they made.

The Court considered the "foundations for the privilege and its history"[60] to support its conclusion that "'reason and experience' no longer justif(ied) so sweeping a rule as that found acceptable by the Court in Hawkins."[61] The Court then balanced the function of

promoting the policies behind the privilege with the attainment of justice and concluded that its modification "further(ed) the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[62]

The balancing procedure that the Court used to justify modifying the privilege, both in Hawkins and in Trammel, clearly establishes that the spousal incapacity privilege is not absolute. Future modifications of the marital privileges must be justified through this same balancing methodology. As the policies behind the privileges change, or are no longer being served by the privileges, then the privileges themselves must change to effect a proper balance.

3. Development of the Spousal Incapacity Privilege in the Military Justice System.

The development of the marital privileges in military law substantially parallels the development in federal law. It is somewhat easier however, to trace the "black letter law" of the marital privileges in the military system because the procedural rules are prescribed by the President[63] in the Manual for Courts-Martial[64]. As a change in the marital privileges in the federal system occurs, these changes are usually incorporated in the military system by a change in the Manual for Courts-Martial.[65] However, as will be shown, changes in the military rules sometimes occurred before the Supreme Court recognized the changes in the federal courts.[66]

As previously discussed, spouses were considered

incompetent to testify, either for or against each other, at common law.[67] This rule of incompetency was recognized and followed in early military courts-martial.[68] By the mid 1800's, the incompetency rule was losing recognition and the rationale for excluding testimony of a spouse centered more on preserving the marital relationship.[69] By justifying the exclusion of testimony on public policy rationale, it was then easier to adopt exceptions to the rule when the public policy was not being served. Accordingly, in cases of personal injury by one spouse against the other, the injured party was allowed to testify against the accused spouse.[70]

After the Articles of War were passed in 1916, the President had the authority and responsibility to prescribe the procedure for courts-martial.[71] Accordingly, the 1917 Manual for Courts-Martial contained the first rules of evidence.[72]

The drafters of the MCM recognized the trend in State courts to abolish the rule of incompetency for spouses.[73] Instead of waiting for the Supreme Court to change the incompetency rule, the drafters, with the assistance of Major (Professor) Wigmore[74], followed the trend in the States and accurately predicted the decisions in both Funk v. United States[75] and Hawkins v. United States[76] providing:

> (1) Wife or husband of an accused may testify on behalf of the accused without restriction.
> (2) Wife or husband of an accused may not be called to testify against the accused without the consent of both accused and witness, unless on a charge of an offense committed by

the accused against the witness.[77]

Since the changes in the spousal incapacity privilege that subsequently occurred in the federal system merely reflected the rule already in effect in the military system, the Manual provision remained relatively unchanged for next sixty years.[78]

In 1980, the Manual for Courts-Martial underwent a major revision when the Military Rules of Evidence were adopted.[79] The Military Rules are substantially similar to the Federal Rules of Evidence in Sections I, II, IV, and VI through XI.[80] Unlike the Federal Rules however, Section V of the Military Rules includes the specific enumerated privileges recognized in the military system[81].

As previously discussed, the Supreme Court announced a major modification of the spousal incapacity privilege in the 1980 case of Trammel v. United States.[82] Newly promulgated M.R.E. 504(a) specifically recognized the spousal incapacity privilege, vesting the privilege, as per Trammel, in the witness spouse.[83] M.R.E. 504(a) remained unchanged in the 1984 version of the Manual and represents the spousal incapacity privilege that is currently being used in the military justice system.[84]

The primary rationale supporting the spousal incapacity privilege remains the belief that the privilege is necessary to protect marital harmony. As justification for including the spousal incapacity privilege, the drafters of M.R.E. 504 adopted the Supreme Court's language in Trammel stating that "when a spouse chooses to testify against the other spouse the marriage no longer needs the protection of the

privilege."[85]

B. Development of the Marital Communications Privilege.

1. Common Law Origins.

The origin of the privilege for confidential marital communications is somewhat obscure, but it appears to have developed as an off-shoot of the spousal incapacity privilege.[86] Since the incompetency rule prevented spouses from testifying on any matter, a rule designed to restrict the substance of such testimony was obviously unnecessary.[87] Instead, the policy of protecting the disclosure of confidential marital communications was often advanced as a basis in support of the spousal incompetency rule.[88] However, as the rule of incompetency disappeared, an independent marital communication privilege emerged in its stead.[89]

In general, the marital communications privilege prohibits the disclosure, during trial, of any communications between husband and wife, made during the marriage. Unlike the spousal incapacity privilege, the communications privilege is perceived as being a true "privilege"[90] and has received widespread support. It was even accepted by Professor Wigmore who stated:

> The policy which should lie at the foundation of every rule of privileged communications appears to be satisfied in the privilege for communications between husband and wife. (1) The communications originate in confidence. (2) The confidence is essential to the

relation. (3) The relation is a proper object of encouragement by the law. And (4) the injury that would inure to it by disclosure is probably greater than the benefit that would result in judicial investigation of truth.[91]

The rationale in support of the marital communications privilege has always been the belief that it was necessary to encourage marital confidences, which in turn promoted marital harmony.[92] Although this traditional rationale is still most often cited by the courts, several commentators believe that the real support for the privilege lies in a "right to privacy" of man and wife that we inherently protect.[93]

2. Development of the Confidential Communications Privilege in the Federal System.

The Supreme Court has consistently affirmed the existence of a confidential communications privilege.[94] In Wolfle v. United States[95], the Court recognized both the existence of the privilege and its underlying rationale, asserting that the confidential communications privilege was essential to the preservation of the marital relation.[96] However, not everyone agrees that it serves this purpose.[97]

Professor Wigmore acknowledged the argument that disclosure in court of confidential marital communications might not affect the extent to which spouses share confidences and therefore, the fourth condition of his test would not be met.[98] However, he felt that since the other three conditions of his test were so

strongly met, the privilege should still be recognized.[99]

The argument that he was willing to acknowledge obviously achieved some support because the confidential marital communications privilege was deliberately omitted from the Proposed Rules of Evidence and the Supreme Court's Rules of Evidence for United States Courts and Magistrates.[100] The Advisory Committee's rationale was:

> The traditional justifications for privileges not to testify against a spouse and not to be testified against by one's spouse have been the prevention of marital dissension and the repugnancy of requiring a person to condemn or be condemned by his spouse. These considerations bear no relevancy to marital communications. Nor can it be assumed that marital conduct will be affected by a privilege for confidential communications of whose existence the parties in all likelihood are unaware.[101]

Since this omission was contrary to the general acceptance of the privilege by the courts, there was considerable criticism of the proposed rule.[102] Congress was apparently fearful of this criticism when it enacted Federal Rule of Evidence 501, for although the rule is silent as to what privileges to recognize, they noted during their discussion that "husband, wife, or any other of the...privileges...based on a confidential relationship...should be determined on a case by case basis."[103]

Since this statement was not part of the rule, it

served two purposes. First, it allowed Congress to avoid the criticism the Proposed Draft Rules had received since they had, in effect, recognized the marital communications privilege. Second, and more importantly, it put the responsibility on the courts to identify the policies supporting the privileges and, when "reason and experience" demand, to modify the privileges to meet these policies.[104]

Despite the omission in the Supreme Courts' proposed rules, federal courts continued to recognize the marital communications privilege under F.R.E. 501[105]. In Trammel the Court cautioned that it was "essential to remember that the Hawkins privilege is not needed to protect information privately disclosed between husband and wife in the confidence of the marital relationship - once described ... as 'the best solace of human existence'," [106] implying that a separate privilege already in existence provided that protection.

3. Development of the Marital Communications Privilege in the Military System.

The marital communications privilege apparently existed, but may not have been recognized as such, during the mid 1800's.[107] Like the spousal incapacity privilege, the development of the confidential communications privilege can generally be followed by examining the provisions of the various Manuals for Courts-Martial. Moreover, the confidential communications privilege has also remained relatively unchanged since it was first set out in 1917.

The 1917 Manual for Courts-Martial set out three rules governing spousal testimony.[108] The first two rules pertained to spousal incompetency.[109] The third rule provided that the "wife or husband of any person may not testify as to confidential communication of the other, unless the other gives consent."[110] The Manual went on to emphasize that "the last two rules are rules of privilege".[111]

Although the marital communications privilege did not change, it was occasionally modified. The 1928 Manual added that the "purpose of the privilege...grows out of a recognition of the public advantage that accrues from encouraging free communication in such circumstances."[112] The Manual then went on to recognize an exception to the privilege for communications overheard by third parties.[113]

The rule remained unchanged until the 1951 Manual. At this time, the volatility of marriage must have been recognized by the drafters because they added the qualification that the communication be made "while they were husband and wife and not living in separation under a judicial decree."[114] More importantly however, the drafters recognized that the marital communications privilege was not an absolute - that other interests could outweigh the public advantage that accrued from encouraging free communications in marriage.[115] They provided an exception to the privilege which allowed an accused to obtain disclosure of a communication, even over the objection of the spouse who made the communication.[116]

The 1969 Manual continued the trend of leaving the language of the privilege itself unchanged, but then

changing the privilege by adding exceptions. First, the drafters added a provision excluding marriages that were a sham.[117] The drafters then added a detailed explanation of the various exceptions.[118] They apparently tried to address every fact pattern that the courts had dealt with since the previous edition.[119] The result was a comprehensive rule that the drafters believed left little room for judicial application of "reason and experience".[120]

With the adoption of the Military Rules of Evidence in 1980, came the first real change to the communication privilege in sixty years. M.R.E. 504(b)(1) continued the rule as it was stated in the previous Manual, but added a provision extending the disclosure prohibition to uninvited third parties.[121] This extension, strengthening the privilege's ability to keep relevant evidence from the fact finder, was not based on any recognized change in federal law, nor was it a result of a shift in the balance of interests requiring more protection for the marital relationship.[122] Without any underlying policy changes to support the change in the privilege, military courts should accordingly, strictly interpret this provision in favor of allowing testimony.[123]

M.R.E. 504(b) was unchanged by the 1984 Manual and represents the current marital communications privilege in military law. Any deficiencies or ambiguities in the rule are to be resolved by the military courts' "interpreting and applying those federal common law principles which seem, in the light of (their) reason and experience, most compatible with the unique needs of military due process."[124]

III. Interpreting and Applying the Marital Privileges in the Military Justice System.

Military Rule of Evidence 1101(b) provides that "(t)he rules with respect to privileges in Section III and V apply at all stages of all actions, cases, and proceedings."[125] With such broad application, it is obviously necessary that the rules for the privileges be clear and unambiguous. Such a need was recognized by the Drafters of the rules who, in the Analysis of the Military Rules of Evidence, explained that:

> Unlike the Article III court system, which is conducted almost entirely by attorneys functioning in conjunction with permanent courts in fixed locations, the military criminal legal system is characterized by its dependence upon large numbers of laymen, temporary courts, and inherent geographical and personnel instability due to the world-wide deployment of military personnel. Consequently, military law requires far more stability than civilian law. This is particularly true because of the significant number of non-lawyers involved in the military criminal legal system. Commanders, convening authorities, non-lawyer investigating officers, summary court-martial officers, or law enforcement personnel need specific guidance as to what material is privileged and what is not.[126]

This need for certainty and stability, they state, justifies the explicit privilege rules in Section V.[127]

As the following discussion will show, however, this ignores the inherent difficulty that exists in interpreting and applying the privilege rules and their specified exceptions.[128]

A. The Spousal Incapacity Privilege.

1. The Rule.

M.R.E. 504(a) states simply that "(A) person has a privilege to refuse to testify against his or her spouse."[129] At first blush, there do not appear to be any ambiguities in the rule that require judicial interpretation. Unfortunately however, that is not the case. For example, the rule only grants the witness spouse the privilege not to "testify", it does not address the requirement to provide information for other purposes or in other forms.[130]

The Air Force Court of Military Review has had two cases in which, at trial, government counsel was able to present evidence on the specific issues it sought to prove, through the spouse, without her testifying.[131] In United States v. Hawley[132], the government, precluded from calling the wife of the accused,[133] called a physician to testify as to pretrial statements the wife made. [134] The Court, citing to State court authorities which would not allow testimony otherwise inadmissable to "enter through the back door",[135] held the admission of the doctor's testimony to be prejudicial error.[136]

The procedural situation of the second case, United States v. Lee[137] could still provide a trap for unwary counsel. In Lee, the spouse of the accused was

called to testify against her husband. Once called, the defendant asserted his privilege to prevent her from testifying and the Court agreed. The government, however, went on to comment during argument on how the wife's appearance matched the description of her that was set out in a document admitted in evidence.[138] Consequently, even though the Defendant asserted his privilege, the government was still able to use the wife as a witness against him.

The Court of Review subsequently found that the evidence was inadmissable and the comment on her appearance to be error.[139] It did not find that the procedure used was improper, noting with approval Professor Wigmore's assertion that:

> In any event, upon the same principal as under the privilege against self incrimination, the party desiring to compel the spouse to testify may at least call for the testimony, and is not to be deprived of it until the party-spouse formally objects and claims the privilege.[140]

The current rule addresses the proper procedure for invoking a marital privilege without knowledge of the members and prohibits comment upon or inference from the privilege claim.[141] These new rules accord with the holding in Lee and, if the attorney involved is aware of the marital privilege, should prevent the improper admission of evidence through the "back door".

The second inherent ambiguity in the privilege is that it only applies to a person's "spouse".[142] In military law, the validity of a marriage is determined by the law of the place where the marriage is contract-

ed[143]. In most cases, the existence of a marriage certificate will establish a valid marriage. But in cases where the parties claim a common law marriage exists, the validity of the marriage, ascertainable by a military judge with legal references available, could be impossible for a "non-lawyer involved in the military criminal legal system"[144] to accurately determine.[145]

2. The Exceptions.

All exceptions provided for in the Rules, if met, eliminate the existence of the privilege in that particular circumstance.[146] An exception which eliminates the spousal incapacity privilege does not necessarily eliminate the confidential communications privilege.[147] In any case, the determination of whether an exception exists in a particular case, is a crucial initial determination that is not always easy to make.

a. M.R.E. 504(c)(1).

M.R.E. 504(c)(1) provides that a spouse does not have the privilege to refuse to testify if, at the time the testimony is to be introduced, the parties are divorced or the marriage has been annulled.[148] This provision reflects the common law (common sense?) rule that there is no privilege to refuse to testify against a spouse, once that person is no longer a spouse.[149] Since the accepted public policy behind the privilege is to protect the marital relationship, a rule allowing

former spouses to refuse to testify is not justified since it would not further this public policy.[150]

Determination of whether the parties have received a valid divorce decree and, if valid, the effective date of the decree, are questions of law which should be decided by the trial judge.[151] Such questions usually arise in the context of determining whether a confidential communication should be protected,[152] but could also exist, for example, in a prosecution of a soldier for fraudulently obtaining allowances based on his or her marital status.[153]

Since the policy supporting the spousal incapacity privilege is the belief that it is necessary to foster marital harmony, it seems logical that the privilege should not apply to spouses who are living apart, pending a divorce. Recently, the Court of Military Appeals addressed a similar question in United States v. Tipton.[154] In Tipton, the Court made it clear that it requires strict interpretation of the language in the privilege rules in order to provide the "certainty and stability necessary for military justice."[155] Accordingly, for the spousal incapacity privilege, even parties who have a legally recognized separation, still retain the privilege.

b. M.R.E. 504 (c)(2)(A).

The common law exception that made a spouse who was the victim of an assault by her spouse competent to testify adversly against her husband has long been recognized in military law.[156] The current Manual continues this policy, in a slightly expanded form,

eliminating the privilege of a spouse to refuse to testify:

> In proceedings in which one person is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse.[157]

This exception reflects the balancing of the marital privilege's policy interests with society's interest in protecting its citizens which, at common law, was said to be an exception of necessity.[158]

The necessity recognized at common law is just as valid today. Crimes against spouses are receiving more attention in all parts of the country. The military is no different. Consequently, the difficulty in applying this exception is not in accepting its utility, rather it is in identifying what crimes fall within the definition of "crimes against the spouse" so as to eliminate the privilege.

The current Manual does not provide any specific examples of crimes that are to be included.[159] Accordingly, the military courts should "resolve inconsistencies and deficiencies in the rules of evidence pertaining to privileges by applying principles of common law".[160] Since military courts have long recognized the exception to the privilege for crimes against the spouse, a review of some of the decisions in which the military courts found the exception, will show the type of offenses generally included within the military law definition. More importantly, the review will focus on

the rationale behind the identification of a particular injury exception, thus identifying types of crimes which should be included.

The early Manual provisions provided the military courts with the following examples of offenses for which the privilege could not be claimed:

> (A)ssault upon one spouse by the other, ... bigamy, polygamy, unlawful cohabitation, abandonment of wife and children or failure to support them,...using or transporting the wife for 'white slave' or other immoral purposes, or forgery by one spouse of the signature of the other to a writing when the writing would, if genuine, apparently operate to the prejudice of such other.[161]

However, the list was clearly not exclusive.[162]

In United States v. Francis,[163] the Air Force Court of Review was faced with the question of whether the wife of the accused was injured within the meaning of the exception by the husband's offenses of carnal knowledge and adultery.[164] The Court compared the charged offenses with the example offense of wrongful cohabitation. Concluding that the wife was as much an injured party by the offenses committed by her husband as would be a spouse in a case of wrongful cohabitation, the Court held that the privilege did not exist for carnal knowledge and adultery.[165]

The Court of Military Appeals acknowledged that the Manual did not define "the full scope of the exception" but declined to try and "mark out its metes and bounds".[166] In United States v. Strand,[167] the Court, citing to federal case precedent,[168] stated that it was

"clear that injury to a testifying spouse is not confined to physical wrong but includes injury to personal rights."[169] However, the Court did not define what it meant by such an injury, instead, like in Francis, it found an offense in the Manual which was similar to the charged offense and found the exception applied.[170]

The difficulty in identifying the offenses which should be included became readily apparent in the 1959 cases of United States v. Wooldridge[171] and United States v. Wise.[172] In Wooldridge, the Court showed great deference to the Supreme Court's language in the recently decided Hawkins case.[173] The Court in Wooldridge held that the offense of forgery of the accused's name to allotment checks was not an offense within the exception. The Court went to great lengths to distinguish United States v. Ryno,[174] a case it had, only a few years earlier, cited with approval, and which held the exact same offense to be one which did cause an injury to the spouse.[175]

Judge Latimer, dissenting in Wooldridge, recognized the need to balance the privilege with the interests of justice when he voiced his concern that the "far-reaching effect of the Court's decision will make it impossible for the services to convict a serviceman for forging his dependent's allotment check."[176] Judge Latimer reminded the Court that it had already recognized that an injury could include an injury to personal rights, and admonished that the forgery offense was such an injury. Realizing that the Court had been unduly influenced by Hawkins, he tried to focus on the separate authority of the President to proscribe procedural rules for the military, pointing

out that this was not inconsistent with the Supreme Court's decision.[177]

Judge Latimer's pleas fell on deaf ears however, because, shortly thereafter, the Court decided Wise which reaffirmed the decision that forgery by a husband of his wife's name on an allotment check did not constitute an offense within the exception.[178]

In United States v. Parker,[179] the Court continued its pattern of excluding spousal testimony, holding that the offense of sodomy did not fall within the category of excepted offenses. The Court perceived a reluctance in the Supreme Court to expand the type of offenses included within the exception, citing to Hawkins and Wyatt as indicative.[180] Chief Judge Quinn disagreed.

The dissent was once again a better reasoned opinion. The Chief Judge, in a footnote, admonished that the opinion suffered "from the failure to take account of the direct impact upon the wife's emotional and mental health which resulted from not only witnessing the performance of the 'abominable and detestable crime against nature,' but having it figuratively thrown back into her teeth by the accused."[181]

The next case in which the Court addressed the injury exception, United States v. Massey,[182] came from the Air Force Court of Review.[183] In Massey, the review court, in a well reasoned opinion, held that the accused spouse's act of taking indecent liberties with his natural daughter resulted in an injury to the wife which brought the offense within the exception.[184]

The Air Force Court provided a logical decision process to follow. First, the Court identified the

common law basis for the exception as that of necessity. Next the Court recognized the trend in other Courts and of legislatures expanding the exceptions to include crimes injuring minor children of the parties. Finally, the Court applied its own reason and experience to the particular facts and determined that there was injury in the form of mental suffering to the spouse.[105] The Court concluded that the interests of justice outweighed those of the privilege stating:

> For us to determine otherwise would give effective license to a degenerate father to wantonly abuse his minor child, even in the very presence of his wife, and then escape punishment in those cases where because of young age or insufficient understanding, the injured child could not testify as to the wrong inflicted upon it.[106]

Despite the strong logic of their decision, the Air Force Court of Review was overruled by the Court of Appeals. The Court once again was unwilling to extend the exception without clear guidance from the Supreme Court.[107] The Court acknowledged that it had departed from its earlier liberal scope to the injury exception because of the Supreme Court's decision in Hawkins. Instead, it now believed that an injury required more than just an outrage to a spouses sensibilities or a violation of the marital bonds. Rather, the crime must involve some direct connection with her person or property.[108] The Court warned that if the exception to the privilege "is not limited to a direct invasion of the wife's rights, the rule will soon be judicially eliminated."[109] The Court concluded enunciating a

modified "I'll know it when I see it" test for identifying the exception offenses.[190]

The dissent by Chief Judge Quinn likens the offense of injury to a child with that of abandonment of a child, a specific example in the Manual. He argues that the policy behind the privilege is to foster family peace, not just the relationship between husband and wife. Adherence to the exclusion rule is not warranted in cases where the family relationship has "deteriorated beyond the point of regenesis."[191]

Judge Quinn's argument was based on the presumption that a privilege exists to serve a function.[192] If it no longer serves that function, regardless of the reason, the privilege should not be applied. In order to determine whether there existed a family (or marital) relationship worth protecting, Judge Quinn suggested a collateral inquiry by the trial judge. He rejected the argument that such an inquiry would "complicate the trial seriously", referring to the numerous separate hearings on admissability of evidence the judge already holds, without complication.[193] He argued that there is no "cogent reason suggesting greater complication and greater difficulty because the preliminary issue is the nature of the relationship between the witness and the accused."[194]

The low point of the Court of Military Appeals interpretation of offenses that constituted injury to the spouse for purposes of extinguishing the privilege to exclude the adverse testimony occured in 1967. In United States v. Rener,[195] the Court not only refused to expand the number offenses included within the privilege exception, it narrowed the exception by

overruling one of its earlier decisions.[196] The Court, citing to its decision in Massey for support, held that the offenses of adultery and cohabitation were no longer within the exception as they did not involve a "direct injury to the witness-spouse". [197] Instead, the Court characterized the offenses as involving "primarily, 'a violation of the marital bonds'".[198]

The Court's treatment of spousal injury issue in this case is confusing. Like Judge Quinn in his dissent in Massey, the Court professes it is applying the privilege so as to serve the public policy considerations behind it.[199] Apparently, the Court felt that a marriage with an unfaithful husband was better for Mrs. Rener than no marriage at all or that if such a marriage is worth protecting, it is easier for the wife to forgive her husband for his infidelity (or sodomy, unlawful cohabitation, and forgery) than for the husband to forgive the wife for fulfilling the legal obligations of a citizen to testify truthfully in a court of law. [200]

In Rener, the Court addressed the possibility of reconciliation[201], thus impliedly accepting Judge Quinn's argument in Massey that an inquiry into the marital relationship is within the authority and capability of the Court.[202] Unfortunately, the Court failed to balance the interests of the marriage with the interests of justice. In Rener for example, the accused's wife was the source of evidence establishing that the accused was married. By holding that adultery was not an offense within the exception, the Court not only overruled the conviction, it gave the accused a license to continue his illicit activities.[203]

Clearly, such a result is inconsistent with the public policy behind the privilege.

Such inconsistencies did not go unnoticed however, for the 1969 Manual expressly overruled the Court's decision in Massey,[204] restating the examples of offenses that caused injury to the spouse and adding "mistreatment of a child of the other spouse" to the list.[205] In rejecting Massey, the drafters of the Manual stated:

> (T)he effect of this case is not compatible with the needs of the military service in which, especially overseas, large groups of military personnel and their dependents live in closely knit communities. In these communities and generally in military life, child beating and child molestation by parents cannot be tolerated and certainly should not be facilitated by a rule of evidence prescribed by the Manual. The marital privilege has no constitutional source and is merely a rule of public policy, particular attempted applications of which should succumb to greater public policy operating in the opposite direction.[206]

Judge Quinn was soon able to see his dissent position in Massey and Rener become the Court's position in United States v. Menchaca.[207] Writing for the Court, Judge Quinn stated that the change to the Manual left "no doubt" that the charged sex offenses against the accused's adopted minor daughter were within the excepted offenses. Additionally, he noted that the Manual change was consistent with the trend in

federal law, which also supported the change in the Court's holdings.[208]

The military appellate courts have not addressed the issue of defining what constitutes an offense "against the person or property of the other spouse or a child of either"[209] since the adoption of the Military Rules of Evidence. The utility of the previous analysis stems from the observation that most of the cases which involve a spousal privilege issue, also involve a crime against a family member. Since spouses and children[210] are often the reluctant witnesses to these crimes, their ability to assert the marital privilege is crucial in determining the appropriate disposition to take in such cases.[211]

Attorneys for both the Government and the accused must be aware of what types of crimes eliminate the privilege.[212] The decision in Menchaca indicates a return by the Court to the earlier liberal interpretation of offenses that cause such injury.[213] However, the language of M.R.E. 504(c)(2)(A) specifies that the crime be against the "person or property" of the spouse or child.[214] Despite the recent emphasis by the Court of Military Appeals on strict interpretation of the language in the privilege rule,[215] the term injury should be interpreted to include direct and indirect injuries. Such a determination by a non-lawyer in the military criminal justice system requires only that the individual exercise his or her "reason and experience"- not any special legal skill or knowledge - in deciding whether the privilege should exist.

c. M.R.E. 504(c)(2)(B).

There is no privilege to refuse to testify when the marriage of the parties is merely a "sham", and remains a sham at the time the testimony is to be introduced against the other.[216] This exception was never questioned at common law or in the federal system because it acts only to prevent an individual from using the privilege solely as a shield to thwart justice.[217] The issue has not been directly addressed by military appellate courts, but its long-time inclusion in the various MCM's indicate its acceptability.[218]

A finding that the privilege does not apply under this exception is uncommon because it requires that the marital relationship be entered into with no intention of the parties to live together.[219] Most of the cases which consider the "sham marriage" issue, are actually determining whether there is a valid marriage, not whether the valid marriage was entered into for a sham purpose.[220] Moreover, the exception requires that the marital relationship remain a sham at the time the privilege is asserted.[221] Since the marriage itself is already valid, it would be difficult to find that the parties were still in a sham marriage, if they both wanted the marital privilege to exist.[222]

The procedure the courts have used - determining the marital status as an interlocutory question - is the same procedure the courts would use to resolve the issue. Evidence admitted for the purpose of determining the applicability of the privilege, could not later be used for another purpose or commented upon.[223]

d. M.R.E. 504(c)(2)(C).

This exception recognizes the Supreme Courts ruling in Wyatt v. United States,[224] and provides:

> In proceedings in which a spouse is charged, in accordance with Articles 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statues under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.[225]

The rule clearly delineates the scope of its application - with one exception. The exception also applies to violations "of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts."[226]

An analysis as to what such statutes are is unnecessary for, as previously discussed, a liberal interpretation of "crime(s) against the person or property of (a) spouse" is currently in effect and should be continued.[227] Proper application of the exception under 504(c)(2)(A) will include any "similar statutes" under this exception.

3. Can a Witness Spouse be Compelled to Testify?

The provisions of Rule 504 clearly describe the right of a witness to refuse to testify against his or her spouse as a "privilege". In United States v. Riska,[228] the Air Force Court of Military Review addressed whether a witness-spouse could be compelled to testify against her husband for assault against her and held that, under the 1951 Manual, she could be.[229] The Court noted that its conclusion was consistent with "the principles of common law as interpreted by federal courts of the United States".[230]

In the Analysis of the Military Rules of Evidence, the drafters are adamant that a witness is compellable, once the marital privilege is found not to apply.[231] In a case involving reluctant witnesses, the determination of whether a privilege exists could be a crucial question requiring a preliminary hearing to resolve.[232]

4. Does the Spousal Incapacity Privilege Apply at Extrajudicial Proceedings?

Military Rule of Evidence 1101 states that "the rules with respect to privileges in Section III and V apply at all stages of all actions, cases and proceedings."[233] That the marital privileges apply at all judicial proceedings[234] and quasi-judicial proceedings is clear.[235] Moreover, the plain meaning of the language used in the rule indicates that the marital privileges have a much broader application. While such broad application may be appropriate for some of the other enumerated privileges in Section V,[236] it is not

appropriate for the marital privileges.

The question has not been addressed by military appellate courts since the rules of evidence were adopted. But it has been addressed in earlier cases. In United States v. Lovell,[237] the accused's wife provided criminal investigators with information about her husband's participation in a robbery.[238] Based on this information, the base commander authorized a search of the accused's quarters, which led to his arrest. Although none of the wife's statements were used in the trial on the merits, they were used at an Article 39(a), 10 U.S.C. § 839(a).[239] The defense counsel argued that the evidence found in the search was inadmissable because the marital privilege prevented using the wife's statements to provide probable cause. The Air Force Court of Military Review disagreed, holding that "the testimonial privilege ... does not extend to preventing a spouse from furnishing evidence which provides probable cause for authorizing a search."[240]

In Lovell, the Court was able to distinguish between the use of statements in a trial on the merits and their use in determining probable cause. M.R.E. 1101(d) implies that the rules with respect to privileges apply at "proceedings for search authorizations".[241] Accordingly, such a distinction can no longer be made.

The strongest argument against applying the marital privileges over such a broad spectrum is that it eliminates the "certainty and stability" sought by both the drafter's and the Court of Military Appeals.[242] As previously discussed, the spousal

incapacity privilege is fraught with inherent ambiguities that require interpretation when determining if the privilege exists.[243] Requiring criminal investigators, for example, to understand and apply the marital privilege rules when investigating suspected criminal activity is clearly unreasonable. Instead, limiting the marital privilege to its traditional scope of application, at trial, provides sufficient protection for the policies behind the privileges, while also protecting the interests of justice.

5. Spousal Incapacity, Recent Trends.

The spousal incapacity privilege, even when vested only in the witness spouse, can still operate to ex-exclude relevant evidence from a trial. Despite recognition of the "general need for untrammeled disclosure of competent and relevant evidence in a court of justice",[244] some courts have applied their "reason and experience" to extend the cloak of marital protection to include all family members.[245]

Although this extension is generally predicated on issues of privacy and is, therefore, more related to the marital communications privilege, it has been asserted as a testimonial privilege.[246] Extension of the privilege in the military would be "contrary to or inconsistent with" the plain language of M.R.E. 504 and therefore should be precluded.[247]

6. Improperly Admitted Testimony - Effect of the Error.

If a spouse is required to testify in violation of the spousal incapacity privilege, what is the effect? First, the court must determine whether the error in admission of the testimony was prejudicial or harmless.[248] Since the marital privileges are not constitutionally based privileges, the error may be found harmless "only upon the determination either that the finder of fact was not influenced by it, or that the error had but a slight effect on the resolution of the issues of the case."[249]

Such an affirmative finding is not easy for an appellant court to make. In United States v.Martel,[250] the Court noted that it had to consider "all relevant factors of record" to determine whether the error was harmless.[251] In this case, the Court focused on how the government's case was noticeably weakened, after the improperly admitted evidence was excised. The evidence in Martel also included a confession by the accused to his wife that he had committed the offenses as planned.[252] Based on all the factors, the Court found the admission of the wife's testimony was prejudicial error and set aside the conviction.[253]

Despite the finding in Martel, improperly admitting sposal testimony will not always require reversal. If the error is solely the fact that the wife testified against her husband, without that testimony adding any evidence that was not already presented in some other form, it is likely that the courts will find the error harmless.[254]

7. Summary.

The privilege of a spouse to refuse to testify is still based on valid public policy. However, the public policy of preserving marital harmony is no longer accepted as absolute. The courts and society recognize that there are other interests to be served by requiring the adverse testimony of a spouse in cases where the spouse or children of the family have been injured, physically or emotionally, by the crimes of the accused. Accordingly, military courts should apply a balancing test of these factors in every case where a witness has, based on the spousal incapacity privilege, refused the court evidence.

B. M.R.E. 504(b). The Marital Communications Privilege.

1. The Rule.

Under M.R.E. 504(b), a person has a privilege to prevent disclosure of any confidential communication made to his or her spouse, while they were legally married, for an indefinite period.[255] Despite the averred justification for having an explicit rule for marital privileges in the military system,[256] the confidential communications privilege is a rule fraught with ambiguities.[257]

The most obvious ambiguity in the rule is defining a "confidential communication". Although the rule provides some assistance in defining "confidential",[258] the military courts have the responsibility to fill in

the gaps in the rule's definition.[259]

a. When is a Communication "Confidential"?

M.R.E. 504(b)(2) defines a communication as being confidential "if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably neccessary for transmission of the communication."[260]

The language of the rule's definition reflects the presumption of confidentiality recognized by the military courts given to communications between spouses.[261] This presumption is rebuttable, with the burden on the Government to overcome the presumption by showing that because of the nature or circumstances under which the communication was made, it was obviously not intended to be confidential.[262] The most common method of doing so is by showing that the communication was intended to be conveyed to other persons.[263]

The common law exception that a person overhearing a confidential communication may testify to it has long been accepted in military law.[264] The language of the Rule suggests that such an exception is no longer valid in that it allows the privilege holder to "prevent another from disclosing" any confidential communications.[265] Although the question under the Military Rules of Evidence has not been addressed by the military appellate courts, disallowing the testimony would not serve to protect the public policy interests behind the privilege.[266]

The Rule identifies the situation where "another" should be prevented from disclosing the communications

- when the circumstances of military life require transmission of communication between spouses through a third party.[267] Accordingly, marital communications which are overheard by, or otherwise come into the possession of,a third party should still be admissible over the communicating spouse's objection.[268]

Inherent in the Rule is continued recognition of the common law principle that a confidential communication disclosed to a third party by the spouse to whom it was communicated, without the knowledge or consent of the communicating spouse, is still privileged.[269] In United States v. Tipton,[270] the Court of Military Appeals affirmed by omission the continued recognition of this principle in the military justice system. At trial, the government introduced several letters written by the accused to his wife which were apparently voluntarily provided by her to the government.[271] On appeal, once the Court found that the marital privilege applied, it held the letters to be inadmissible.[272]

Determining whether a communication was intended to be conveyed to other persons necessarily focuses on the communicating spouses' intent. Obviously, communicating a statement to the spouse and another person simultaneously indicates no such intent.[273] Moreover, the communication does not have to occur simultaneously to negate such intent. Voluntary disclosure of information to a third party that is substantially similar to information also communicated to a spouse is sufficient to support a finding that a spouse intended his communications to his wife to be conveyed to a third person and the communication, therefore, admis-

sible.[274]

b. What Constitutes a "Communication"?

An oral or written statement from one spouse to the other is clearly a communication and, if confidential, protected from disclosure by the privilege.[275] But obviously, a husband and wife can, and often do, communicate in other ways. Many jurisdictions recognize this and provide that where the confidential communication is an act, it will be protected.[276] M.R.E. 504 does not address this issue. Recently, the Army Court of Military Review has and concluded that acts could constitute protected communications.[277]

In United States v. Martel,[278] the Army Court of Military Review applied its "reason and experience" to the privilege rule and extended its cloak of protection to communicative acts.[279] Staff Sergeant Martel was convicted of larceny and housebreaking after he broke into an non-commissioned officers' club and stole $3500.[280] At trial (and at the Article 32 investigation)[281] his former wife, Gracie Hendrix, was allowed to testify against him.[282]

The first question the Court resolved was whether the witness could testify concerning any acts of the accused she observed. The Court recognized the general rule that the marital privilege does not extend to mere acts and concluded that testimony concerning "obviously noncommunicative acts are not 'confidential communications' within the meaning of M.R.E. 504(b)."[283]

Although accepting the general rule, the Court also acknowledged and subsequently adopted the federal

courts' exception for acts that "are intended to convey a private message to the spouse."[204] The Court held that "a spouse's acts, whether accomplished by expression or gesture, must either be communicative per se or intended to convey a private message in order to support an invocation of the spousal privilege."[205] A witness spouse may, however, testify as to his or her own acts, so long as those acts are not "inextricably bound to any privileged communication by or with" the other spouse.[206]

The Courts' decision and the rationale on which it is based, is consistent with the generally accepted rules in federal criminal practice.[207] Moreover, if the confidential communications privilege is to be applicable in the military legal system, this interpretation is a logical and necessary step in clarifying the rules concerning it.

Unfortunately, this interpretation does not provide the "specific guidance" deemed necessary for the many non-lawyers who are involved in the military justice system. As the Court recognized, "no reliable test has been devised which can be universally applied to categorize acts either as communicative or noncommunicative."[208] Accordingly, each case must be resolved on its facts.[209] While such a procedure is both reasonable and manageable in a judicial proceeding, its application by commanders and other non-lawyers is not likely to reflect the "certainty and stability" the drafters of the rules believed the enumerated privileges should achieve.

c. When Can the Confidential Communications be Made?

The privilege applies only to communications that were made while the parties were husband and wife and not separated as provided by law.[290] Additionally, there is no guidance in the rule as to what evidence, if any, is required from a party in order to establish a marital relationship and claim the marital privilege. Nevertheless, when the validity of a marriage is at issue, it is determined by reference to the lex loci contractus.[291] This is a relatively easy process in a judicial proceeding where legal references are usually available. Obviously, this would not be true for the non-lawyers involved in the military justice system who would not have the same resources, or the experience in using them.

The military courts strictly apply the communications privilege once the marital relationship is established. In United States v. Tipton,[292] the Court of Military Appeals provided clear guidance that:

> (U)nder the literal wording of the rule, the privilege exists whether or not the party making the communication was even aware the relationship existed. Thus, someone who had entered a common-law marriage with another person apparently would be entitled to the benefits of the privilege with respect to a confidential communication, even if he was unaware that the marital relationship had been established. By the same token, the privilege would exist even if one spouse had

the erroneous belief that he had been divorced from the other.[293]

Such strict interpretation clearly provides the "certainty and stability" the drafters of the Rule sought, even though it disregards the reason for the privilege.[294]

Like the spousal incapacity privilege, the communication privilege applies only to husbands and wives- its protection does not extend to confidential communications between unmarried couples living together, nor does it apply to any other family relationships, such as parent-child.[295]

In Tipton, the Court of Military Appeals provided additional "certainty and stability" concerning the "not separated as provided by law" provision.[296] Tipton, a machinist's mate second class in the Navy, was convicted of making a false official statement on a dependency application; larceny of temporary lodging allowances and dislocation allowances; submitting a false claim for overseas allowances for four dependents; ans for 19 instances of obtaining other benefits from the Navy by falsely representing that he was lawfully married to Shirley M. Heckard and that she and her three children were his lawful dependents.[297]

At trial, the accused's real wife, Lani Mai Tipton, was a government witness called to prove that the accused knew he was not legally divorced at the time he applied for and obtained the various benefits for Miss Heckard.[298] Part of the proof was contained in several letters the accused had sent to her, approximately four years after they had quit living together. The accused objected to the letters as confidential

marital communications. The trial counsel argued that no privilege existed since the parties had not lived together for several years. Concluding that the parties had not been legally separated, the military judge sustained the objection.[299]

The Court of Military Appeals agreed. The Court recognized that there was case support for the governments position that the marital privilege should not apply to parties who have been separated for several years and even cited a case which refused to extend the confidential communications privilege to a permanently separated couple[300]. The Court then distinguished its case, pointing out that the accused's letters contained some language about reconciliation and, therefore, the parties were not permanently separated.[301]

The Court then addressed the difference between a federal court, applying the "principles of common law as they may be interpreted by the courts of the United States in light of reason and experience", and a military court applying the specific privilege rules of the Military Rules of Evidence,[302] implying that the military court has little room for interpretation.[303] The Court then interpreted the provision of the Rule, but with a view to providing specific guidance to those who will be applying the military rule of evidence.[304]

The plain language of the rule contemplates some kind of legally recognized separation. Accordingly, the Court held that a judge need only "inquire whether there has been some type of legally recognized separation and need not consider whether or how long the parties have lived apart or what their intent was for the future."[305]

The Court declared that "this clear test provides the 'certainty and stability necessary for military justice.'"[306] It then provided that the "law to be applied in determining whether the husband and wife were legally separated...is the law of the State where the parties were domiciled."[307] It seems unlikely that the non-lawyer faced with making this determination will find the test to be as clear.

d. Duration of the Privilege.

Unlike the spousal incapacity privilege, communications which are privileged under the Rule retain their privileged status beyond the duration of marriage.[308] So long as the communication was made during the marriage, the privilege may be invoked to prevent disclosure.[309]

e. Who May Claim the Privilege?

It is generally accepted that the right to claim the communications privilege exists in the party who made the communication.[310] The rule recognizes this, but goes further. The rule also authorizes the receiving spouse to claim the privilege on behalf of the communicating spouse.[311] In effect, this provision provides the witness spouse with an additional, albeit limited, testimonial privilege.

The authority of the witness spouse to prevent disclosure of confidential communications is not absolute. The rule apparently reflects a decision that the right of an accused to obtain a fair trial out-

weighs the policy behind protection of confidential communications of spouses. At the request of an accused, even if he was not the person who made the communication, any confidential communication must be disclosed.[312]

f. Waiver

Military Rule of Evidence 510(a) provides that the privilege against disclosure of a confidential communication is waived if the holder of the privilege "voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege."[313] This provision is primarily a restatement of the circumstances previously discussed under which a communication would lose its qualification of confidentiality.[314] The two concepts differ in that a waiver implies that the privilege exists as to a specific communication, but that the holder of the privilege, by his actions or words, voluntarily does not invoke it. The determination that there is no confidentiality as to a specific statement results in a finding that no privilege exists which could be waived.

In practice, the two concepts are just as difficult to distinguish. However for purposes of this discussion, a waiver under M.R.E. 510 involves a voluntary disclosure or consent to disclosure occurring at any stage of the courts-martial process.

The military courts have often addressed waiver of the marital privileges by voluntary disclosure or

consent.[315] The issue is usually not whether there has been a disclosure - as it is in the confidentiality determination - rather the question for the courts to determine is whether the disclosure or the consent to disclosure was voluntary.[316]

Consent may be either express or implied.[317] If a witness spouse takes the stand and testifies as to confidential communications from an accused, failure to object to the testimony would constitute an implied waiver.[318] Moreover, in United States v. Gibbs,[319] the Air Force Court of Military Review stated that the objection "must refer specifically to the privilege, and it must be made before the answer to the question calling for the revelation is given."[320]

Such a "clear test" is consistent with providing the "certainty and stability" needed in the military justice system.[321] Additionally, requiring the objection to be made before the answer is given is consistent with the purpose of the privilege - preventing disclosure of confidential communications. Once a communication has been disclosed, the "damage" to the marriage has already been done.

Disclosure by the accused usually occurs during his or her own testimony. M.R.E. 510(b) recognizes this and provides that an accused does not waive a privilege he or she may have merely by testifying. The testimony must concern the privileged matter or communication and it must be voluntary.[322] Inherent in this rule is recognition that the public policy behind the privilege cannot be perverted into a shield behind which an accused's testimonial untruths can go unchallenged.[323] In United States v Trudeau,[324] the Court

stated that when an accused has "voluntarily thrown open a subject which the law would otherwise have kept closed and made it an integral part of his defense, (he) cannot deny the Government the right to challenge his credibility on it."[325]

In Trudeau, the accused was charged with committing indecent acts on a child. At trial, his defense was that the boy attempted to fondle him, but that he had stopped him. To bolster his story, the accused asserted that he had told his wife about the boy's behavior after it happened. On cross-examination, he again asserted that he had told his wife "everything".[326] His wife had a different version of the facts. When called as a Government witness to relate what the accused had told her, he asserted his marital privilege.[327]

Obviously the accused did not voluntarily waive his privilege. Instead, the focus in this case is on whether the disclosure of the communication was voluntary. When an accused discloses the communication during his direct examination, voluntariness is assumed.[328] However, if the accused has asserted the marital privilege at an earlier time in the proceedings, unsuccessfully, his subsequent voluntary testimony will not act as a waiver.[329]

The Army Court in Martel addressed the issue of waiver under M.R.E. 510(b).[330] Before trial, the military judge had denied the defense objection to disclosure of certain communications the accused had made to his wife. During trial, the accused voluntarily testified that he had not committed the offenses, but did not voluntarily testify as to the communica-

tions with his wife.[331] On appeal, the Court held that when an accused "timely asserts the (marital) privilege at trial" and is "erroneously thwarted in this effort by the trial judge", it would be "fundamentally unfair to invoke a waiver of the marital privilege".[332]

The Army Court also accepted the Air Force Court's assertion in Gibbs that the accused's testimony to the confidential communication must occur during his direct examination.[333] This is consistent with the voluntariness determination and will probably be a requirement for a finding of waiver.[334]

Application of waiver under M.R.E. 510 is strictly applied. In Martel, one implied basis for denying the waiver was the government's failure to raise the issue at trial.[335] There is no requirement in the rule for the military judge to raise, sua sponte, any element of the privilege, including waiver. In Tipton, the trial judge raised the issue of waiver as one of his reasons for admitting several letters against the accused.[336] The Court of Military Appeals however, did not address the issue of waiver. Instead, it decided the admissibility issue solely on the grounds which the Government had offered the evidence - as rebuttal evidence to the accused's unsworn statement.[337] Finding that the letters did not conform to the prosecutor's avowed purpose, the Court held them to be inadmissible. The Court's unwillingness to address the waiver issue, especially after the trial judge had addressed it, reinforces the necessity for military attorneys to understand the nuances of the privilege, and to be able to explain those nuances in trial.

2. Exceptions to the M.R.E. 504(b).

a. M.R.E. 504(c)(2)(A).

M.R.E. 504(c) provides three enumerated exceptions to the marital communications privilege.[338] The first and most common exception is in proceedings where "one spouse is charged with a crime against the person or property of the other spouse, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse."[339] This provision is consistent with the privileges' application in federal courts and reflects society's overriding interest in the prosecution of anti-marital offenses.

As with the spousal incapacity privilege, many cases in which the confidential communications privilege is at issue may involve a crime against the other spouse. Determination of whether a crime meets the definition of a crime against a spouse and thus falls within the exception is, as with the spousal incapacity privilege, the most difficult aspect of this exception. As previously discussed, the language in the exception to the rule opens the way for the military courts to return to a liberal definition of such crimes.[340] The responsibility to effect this return, however, rests with the military attorneys practicing in the courts. Unless the exception is asserted, the government's (and thus society's) overriding interest in prosecution of these offenses is not considered.

b. M.R.E. 504(c)(2)(B).

Communications made during a "sham" marriage are not protected.[341] This exception is similar in many respects to the requirement that there be a valid marriage and that there not be a separation as provided by law. As previously noted, the definition of a "sham marriage" focuses on the intent for which the parties married.[342] If their marriage was for the purpose of invoking the marital privilege for either of the parties, the courts have unceremoniously declared the marriage to be a "sham" and refused to apply the privilege, even if the marriage later ripened into a valid marriage.[343]

c. M.R.E. 504(c)(2)(C).

As it does with the spousal incapacity privilege, this exception provides that the marital communications privilege does not exist in proceedings in which a spouse is charged "with importing the other spouse as an alien for prostitution or other immoral purpose".[344] Although in practice this exception is not often applied because of its limited scope, its existence as an enumerated exception serves two purposes. First, it evidences an intention that the exception for a crime against a spouse is not to be limited to crimes of only physical violence. Second, by specifically directing the military system to incorporate "similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts",[345] the rule impliedly directs the military

courts to apply the same "reason and experience" analysis of the federal courts.[346]

d. Other Exceptions.

Many federal courts will not consider communications between spouses regarding crimes in which they are joint participants as privileged marital communications.[347] The Army Court of Military Review adopted this exception in Martel.[348]

The Court adopted this exception after "balancing the need for truth in criminal trials against the importance of the policy behind M.R.E. 504(b) in the light of reason and experience".[349] The exception and the rationale behind the exeption are valid. However, after the Court of Military Appeals rejected the federal court interpretation guidelines in favor of an interpretation which gives "specific guidance to those who would be applying the Rule(s)", the continued validity of the joint participation exception is questionable.[350]

3. Applicability of the Privilege to Extrajudicial Proceedings.

As previously discussed, M.R.E. 1101 indicates that the privilege rules now apply at extrajudicial proceedings.[351] However, in 1961 the Court of Military Appeals held that the marital communications privilege did not apply to extrajudicial proceedings.[352] While the validity of the Court's holding is certainly questionable now, the rationale it used to justify the

decision is worth reviewing.

In United States v. Seiber,[353] the accused's ex-wife provided information to criminal investigators which led them to discover that the accused had submitted false documents to secure his Regular Army commission. At trial, the accused asserted that the evidence obtained was inadmissible because the information provided by his ex-wife was privileged confidential marital communication. The board of review agreed with the accused and found the evidence to be inadmissible as "the fruit of her poisoned declarations."[354]

The Court of Military Appeals disagreed. The Court first recognized the public advantage that accrues from encouraging free communication between spouses. It then went on to note that any claim for excluding evidence "must be justified by an over-riding public policy expressed in the Constitution or the law of the land."[355] Balancing these considerations, the Court held that the marital privilege has no applicability to extrajudicial occurences.[356]

The Court's rationale in Seiber is still valid. Despite the language of M.R.E. 1101, it seems unlikely that the drafter's intended to tilt the balance so far away from the interests of justice. There have not been any major shifts toward expanding the marital privileges since 1960 - instead the trend has been to limit them.[357] Accordingly, the marital privileges should not be applied at extrajudicial proceedings.

4. The Effect of Improperly Admitting Privileged Confidential Communications.

As previously discussed, the test for a nonconstitutional error is whether or not the error was harmless.[358] For cases involving improperly admitted confidential communications, such a finding is unlikely.

Obviously, the communications introduced as evidence have to be relevant to the case, regardless of their confidentiality, in order to be admissible.[359] The Court of Military Appeals in Tipton, effectively adopted a "per se" error test for improperly admitted confidential communications.[360] The Court remarked that it was relying on the prosecutor's evaluation that the evidence would have some effect on the members. If it is worth presenting to the members, then it must have some impact on their decision and, therefore, the Court cannot find the error harmless.[361]

Although the decision in Tipton may be somewhat unique, it is the probable result in any case where improperly admitted communications are involved. It is incumbant on the attorneys involved to clearly establish the basis for admission in the record.

5. Summary.

The privilege for confidential marital communications, despite the averred intentions of the drafters of the Rules, is fraught with ambiguities that are too complex or technical for resolution by the many non-lawyers in the military justice system that may be called upon to apply it without the benefit of the legal references available at a judicial hearing. Accordingly, the trend of the military courts is to

strictly interpret and apply the marital communications privilege and its exceptions, in an effort to achieve the certainty and stability believed necessary for the military justice system.

IV. Conclusion.

The rationale for both marital privileges remains the concern for the marital relationship. While good arguments can be made that the privileges do not, to any noticeable degree, assist in the preservation of marital relationships, establishing that fact is difficult, if not impossible, to do. In any case, M.R.E. 504, with supplementation by the military courts, provides sufficient protection to those aspects of the marital relationship that the privileges were designed to protect. The problems with the privilege arise in trying to have this protection applied at all stages of all proceedings.

As previously discussed, any determination of whether a privilege exists, inherently involves the interpretation and application of legal concepts.[262] The Court of Appeals in Tipton tried to interpret the language in M.R.E. 504(b)(1) so as to provide a clear test for use in the military justice system, and did provide a test any military judge can apply. But what is a clear test for a military judge, might well be an unintelligible nightmare for one of the "non-lawyers" in the system, resulting in the improper application of the privilege and an increased distaste for the system.

Because of these inherent difficulties, M.R.E. 504 should only apply at judicial proceedings. The exis-

tence of a privilege is a question to be determined by the military judge under M.R.E. 104(a). A military judge can, by applying a balancing test, best insure that the interests of public policy in fostering marital harmony are adequately balanced with the interests of justice.

## ENDNOTES

1. Hawkins v. United States, 358 U.S. 74,81-82 (1958) (Stewart,J.,concurring).

2. It is generally recognized that the marital relationship gives rise to two distinct privileges. These are: (1) the privilege to prevent a party's spouse from testifying against him or her (more commonly referred to as the anti-marital facts privilege); and (2) the privilege to prevent disclosure of confidential communications made to one's spouse during the course of the marriage. In order to be consistent with the identification of the privileges in Military Rule of Evidence 504, in this paper, the first type of privilege is referred to as the Spousal Incapacity privilege and the second type as the Marital Communications privilege.

3. The Military Rules of Evidence may be found in Part III of the Manual for Courts-Martial, United States, 1984 (hereinafter cited as MCM, 1984). Section V of the Rules contains the enumerated privileges that are recognized in military law.

Mil. R. Evid. 504 reads as follows:

> (a) Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse.
> (b) Confidential communication made during marriage.
> (1) General rule of privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.
> (2) Definition. A communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons

other than those reasonably necessary for transmission of the communication.

(3) Who may claim the privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) Exceptions.

(1) Spousal incapacity only. There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) Spousal incapacity and confidential communications. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

(C) In proceedings in which a spouse is charged, in accordance with Articles 133

> or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

4. The relatively few cases in which the military appellate courts have addressed the issue attest to its absence at the trial level. Moreover, in some cases even when addressed on appeal, it is an issue identified for the first time by appellate defense counsel.

Like any attorney involved in the criminal justice in Germany, I participated in numerous criminal cases. The issue of marital privilege was only raised in one of them. In retrospect, however, it is likely that the spousal testimony in some of these cases, such as testimony about marital disharmony elicited to discredit mitigation evidence, could have been excluded had the confidential communications privilege been exerted.

Unfortunately, crimes arising out of domestic disturbances are prevalent in every military community. Accordingly, the existence of a marital relationship, and therefore, a marital privilege, in a criminal case is not uncommon. Although not every case is resolved at trial by courts-martial, the marital privileges "apply at all stages of all actions, cases and proceedings." So the potential for application of the marital privileges exists outside the courtroom and, in many instances, without the knowledge or assistance of any military attorney. See Mil. R. Evid. 1101.

5. In the military justice system the privilege rules, unlike other Military Rules of Evidence, apply in "investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence under Article 72; proceedings for search authorization; proceedings involving pretrial restraint; and in other proceedings authotized under the Uniform Code of Military Justice or ... Manual and not listed in rule

1101(a)." See Mil. R. Evid. 1101.

6. See the discussion following Rule 501 in the Manual for Courts-Martial, United States, 1984, Analysis of the Military Rules of Evidence (hereinafter cited as MCM Analysis M.R.E 501).

7. See Mil. R. Evid. 102. The rules are to be construed to promote the "growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Id.

8. United States v. Martel, 19 M.J. 917,925 (ACMR 1985).

9.See Reutlinger, Policy,Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege, 61 Calif. L. Rev. 1353 (1973).

10. See 8 Wigmore, Wigmore on Evidence § 2227 (McNaughton rev. ed. 1961). The marital privileges appeared in reported cases as early as 1580. See Bent v. Allot, 21 Eng. Rep. 50 (1580).

11. See generally 8 Wigmore, supra note 10, §2228.

12. C. McCormick, Evidence §66, at 144 (Cleary 2d ed. 1972).

13. "for they are two souls in one flesh" Coke, A Commentarie Upon Littleton 6b (1628) quoted in 8 Wigmore, supra note 10, § 2227 at 212.

14. See 1 W. Blackstone,Commentaries 431:

> But, in trials of any sort, they are not allowed to be evidence for, or against, each other: partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, "nemo in propria causa teflis esse debet"(no one ought to be a witness in his own case); and if against each other, they would contradict another maxim, "nemo tenetur seipsum accusare"(no one has to accuse himself). Quoted in 8 Wigmore, supra

note 10, § 2228 at 214.

15. See 8 Wigmore, supra note 10, § 488 (collecting the statutes abolishing the interest disqualification for witnesses).

16. See generally, 8 Wigmore, supra note 10, § 2228. Wigmore identified the following rationale as those advanced in support of the privilege:

(1). The unity and identity of married persons.
(2). The legal policy of marriage.
(3). The privilege against self-incrimination.
(4). The danger of causing dissension in the family.
(5). The natural repugnance to compelling a wife or husband to be the means of the others condemnation. Id. at 216,217.

17. Wigmore called the "judicial ratiocination...one of the most curious and entertaining chapters of the law of evidence." It was "curious because the variety of ingenuity displayed, in the invention of reasons "ex post facto" for a rule so simple and so long accepted, could hardly be believed but for the recorded utterances." 8 Wigmore, supra note 10, § 2228, at 213.

18. 8 Wigmore, supra note 10, § 2228 at 216.

19. See Stein v. Bowman, 38 U.S. 209 (1839). In a civil action, the Court ruled that a wife's evidence was inadmissable, even though her husband was deceased, citing the strong policy considerations of marital harmony and familial peace. Id., at 211,223.

20. Id. The Court recognized that the rule "protects the domestic relations from exposure,(and) rests upon considerations connected with the peace of families." Id. at 222-223.

21. 8 Wigmore, supra note 10, § 2228 at 220.

22. Although it had the opportunity to abolish the rule, the Supreme Court refused to do so during this time. See Graves v. United States, 150 U.S. 118,121 (1893)("In this case the wife was not a competent witness either in behalf of, or against her husband; if he had brought her into court, neither he nor the government could have put her upon the stand.").

23. Funk v. United States, 290 U.S. 371 (1933).

24. 290 U.S. at 381.

25. Id. This is the same argument which the Court apparently accepted as justifying the spousal incapacity privilege, since it remained in effect.

26. Id.

27. See Yoder v. United States, 80 F.2d 70 (10th Cir. 1935). The Tenth Circuit, noting that the question whether a wife is a competent witness against her husband was not addressed by the Court in Funk, decided, based on the trends challenging the denial of access to facts, that a wife was a competent witness against her husband. Id. at 668. Later, Yoder was expressly overruled by Hawkins v. United States, 358 U.S. 74 (1958).

28. In the interim, federal and state courts, as well as legislatures, had fashioned various exceptions to the marital privileges resulting in its inconsistent application. See generally, Note, Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend, 38 Va. L. Rev. 359,362-367 (1952).

29. Hawkins v. United States, 358 U.S. 74 (1958).

30. 18 U.S.C. § 2421.

31. Hawkins, 358 U.S. at 74.

32. Id. at 74-75. The Tenth Circuit affirmed the decision in Hawkins v. United States, 249 F.2d 735 (10th Cir. 1957).

33. Justice Black noted:

> While the rule forbidding testimony of one spouse for the other was supported by reasons which time and changing legal practices had undermined, we are not prepared to say the same about the rule barring testimony of one spouse against the other. The basic reason the law has refused to pit

wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well. Such a belief has never been unreasonable and is not now." 358 U.S. at 77.

34. Id. at 79.

35. Wolfle v. United States, 291 U.S. 7 (1934) (The Court set out the modern test for determining the law of privilege:

> The rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in light of reason and experience."). Id. at 12.

36. 358 U.S. at 79.

37. Hawkins v. United States, 358 U.S. 74,82 n.4 (1958) (Stewart,J., concurring).

38. 28 U.S.C. § 331 (1958).

39. Preliminary Draft of Proposed Rules of Evidence for United States District Courts and Magistrates, 46 F.R.D. 161,173 (1969) (hereinafter cited as Prop. R. Evid.)

40. Id. at 248-279.

41. Id. at 263. The committee recognized the following aspects of the marital privilege before deciding on which to recommend:

> (1) incompetencey of one spouse to testify against the other;(2) privilege of one spouse not to testify against the other;(3) privilege of one spouse not to have the other testify against him; and (4) privilege against disclosure of confidential communications between spouses. Id. at 263.

42. Prop. R. Evid. (2nd draft), 51 F.R.D. 315, (1971). The revised draft added a subsection permitting either spouse to invoke the privilege. "(T)he privilege may be claimed by the person or by the spouse on his behalf." Id. at 369.

43. Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1972).

44. 87 Stat. 9 (1973). Although it rejected the Supreme Court's rules, Congress was certainly cognizant of the harsh criticism the proposed privilege section had received (See generally, Black, The Marital and Physician Privileges-Reprint of a Letter to a Congressman, 1975 Duke L.J. 45.). The Senate Judiciary Committee stated:

> It should be clearly understood that, in approving this general rule as to privileges, the action of Congress should not be understood as disapproving any recognition of...(the) husband-wife, or any other of the enumerated privileges contained in the Supreme Court rules. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined an a case-by-case basis." S.Rep. No. 93-1277, 93rd Cong., 2nd Sess., (1974), reprinted in U.S. Code Cong. & Ad. News 7051,7059.

45. Federal Rules of Evidence, 28 U.S.C. (1975).

46. See supra note 35 and accompanying text.

47. Fed. R. Evid. 501.

48. Congress' intention was not to freeze the law of privilege, but to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate) quoted in United States v. Trammel, 445 U.S. 40 (1980).

49. See Federal Rules of Evidence, Appendix of Deleted and Superseded Materials, Rules 501-513.

50. See e.g., Wyatt v. United States, 362 U.S. 525 (1960). In Wyatt, the Court recognized an exception to Hawkins in cases where one spouse commits a crime against another spouse. Id. at 526.

51. See Trammel v. United States, 445 U.S. 40 (1980).

52. 445 U.S. 40 (1980).

53. 445 U.S. 40,41-42 (1980).

54. Id. at 42.

55. Id. at 42-43.

56. Id. at 42.

57. The District Court ruled that she could testify to "any act she observed during the marriage and to any communication 'made in the presence of a third person'; however, confidential communications between petitioner and his wife were held to be privileged and inadmissable." Id. at 43.

58. Trammel v. United States, 583 F.2d 1166 (10th Cir. 1978).

59. Trammel, 445 U.S. at 53.

60. Id. at 47-53.

61. Id.

62. 445 U.S. at 53.

63. Uniform Code of Military Justice, art. 36, 10 U.S.C. § 836 (1984) (hereinafter cited as UCMJ). Initially, the authority was found in paragraph 198, Manual for Courts-Martial, United States, 1917 (hereinafter cited as MCM, 1917), which was Article 38 of the Articles of War. It stated that "(t)he President may, by regulations which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial."

64. Manual for Courts-Martial, United States, 1984 (hereinafter cited as MCM, 1984). The MCM provides: "These rules govern the procedures and punishments in all courts-martial..." Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 102(b) (hereinafter cited as R.C.M.).

65. See e.g. supra notes 80-85, and accompanying text.

66. See e.g. supra notes 68-71 and accompanying text.

67. See supra notes 10-18 and accompanying text.

68. See Alexander Macomb, A Treatise on Martial Law and Courts-Martial, at 114 (1809) (In the section discussing disqualifications from giving evidence, Macomb states:

> The strongest of these disqualifying relations, is that of husband and wife; for these being in the eye of the law, but one person, it were the same as a party giving evidence in his own cause; besides, they are presumed to be under the strongest bias of affection and influence; and even where that presumption is manifestly excluded, the departure from this rule would lay the foundation of rancour and family disquiet, and so be hostile to the sacred institution of marriage. Husbands and wives, therefore, can neither be witnesses for or against each other in any action. Id.

69. See S.V. Benet, A Treatise on Military Law and the Practice of Courts-Martial, at 239 (1862).

70. Id. at 241. Since the rule was applied to further the public policy of marriage, it was strictly applied only to those who had entered a marital relationship, not to persons living together. Id. at 240.

71. Paragraph 198, MCM, 1917 at 97.

72. MCM, 1917.

73. MCM, 1917, at paragraph 213.

74. MCM, 1917 at XIV (Professor Wigmore's assistance was noted in the Introduction which stated:

> In preparation of the (Evidence chapter), this office has had the assistance of Prof. Wigmore of the Northwestern University, recently commissioned a major and judge advocate in the Officer's Reserve Corps. Prof. Wigmore has given liberally of his time in the preparation of this chapter, has lent the authority of his name to what appears therein, and has performed a work of great value for which appreciation will be general throughout the service.) Id.

75. Funk v. United States, 290 U.S. 371 (1933). The wording of the spousal competency rule for courts-martial was very similar to that the Court used in Funk.

76. Hawkins v. United States, 358 U.S. 74 (1958).

77. MCM, 1921, para. 213. The third paragraph provided "(3) Wife or husband of any person may not testify as to confidential communication of the other, unless the other give consent." Id.

78. See generally Manual for Courts-Martial, United States, 1921, para. 213; Manual for Courts-Martial, United States, 1928, para. 120 d; Manual for Courts-Martial, United States, 1949, para. 134d; Manual for Courts-Martial, United States, 1951, para. 148 e; Manual for Courts-Martial, United States, 1969, para. 148 e.

79. See Manual for Courts-Martial, 1969 (Rev. ed.), Military Rules of Evidence (C3, 1 Sept. 1980).

80. Saltzburg, Schinasi, and Schlueter, Military Rules of Evidence Manual, at XV (1981).

81. Mil. R. Evid. 501(a) identifies the sources of the privileges in military law as:

> (1) The Constitution of the United States as applied to members of the armed forces;
> (2) An Act of Congress applicable to trials by courts-martial;
> (3) These rules or this Manual; or

(4) The principles of commmon law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

82. 445 U.S. 40 (1980). See supra notes 52-62, and accompanying text.

83. Mil. R. Evid. 501(a). The rule states "Spousal incapacity. A person has a privilege to refuse to testify against his or her spouse." In the Analysis to the rule, the drafters acknowledged that "Rule 504 (a) is taken generally from Trammel v. United States, 445 U.S. 40 (1980) and significantly change(d) military law in this area... Under the new rule, the witness spouse is the holder of the privilege and may choose to testify or not to testify as the witness spouse sees fit." Id.

84. MCM, 1984.

85. MCM, Analysis M.R.E. 504.

86. See, 8 Wigmore, supra note 10, §§2332-2341.

87. Id. § 2333.

88. Id.

89. See generally, 8 Wigmore, supra note 10, § 2333.

90. The general rule of incompetency prohibited a person from testifying, even if he or she wanted to. A true privilege implies that there be a right to testify involved that, for policy reasons, may or may not be exercised.

91. 8 Wigmore, supra note 10, § 2332, at 642.

92. McCormick, supra note 12, §90, at 179.

93. See e.g. McCormick, supra note 12, § 90 at 179 ("All of us have a feeling of indelicacy and want of decorum in prying into the secrets of husband and wife.").

94. See e.g., Trammel v. United States, 445 U.S. 40 (1980); Pereira v. United States, 347 U.S. 1 (1954); Blau v. United States, 340 U.S. 332 (1951); Wolfle v. United States, 291 U.S. 7 (1934); Hopkins v. Grimshaw, 165 U.S. 342 (1897); and Stein v. Bowman, 38 U.S. 209 (1839).

95. 291 U.S. 7 (1934).

96. 291 U.S. 7 (1934).

97. See, e.g., Hutchins and Slesinger, Some Observations on the Law of Evidence: Family Relations, 13 Minn. L. Rev. 675 (1929).

98. 8 Wigmore, supra note 10, § 2332.

99. Id.

100. See notes 40-45, and accompanying text.

101. See Proposed Draft Rules, 51 F.R.D. at 370.

102. See generally, Haney, The Evolutionary Development of Marital Privileges in Federal Criminal Trials: Constricting the Invocation and Growth of Spousal Privileges in Federal Criminal Cases by Interpreting the Common Law in the "Light of Reason and Experience", 6 Nat'l.J.Crim.Def. 99 (1980).

103. See, United States v. Allery, 526 F.2d 1362,1366 (8th Cir. 1975), (quoting S. Rep. No. 93-12777, 93d Cong., 2d Sess. 1974, reprinted in 1974 U.S. Code Cong. & Ad. News at 7059).

104. See Allery, 526 F.2d at 1364.

105. See e.g., United States v. Tsinnijinnie,601 F.2d 1035 (9th Cir. 1979), cert den 445 U.S. 966; United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978), reh den 579 F.2d 644, cert den 439 U.S. 988; United States v. Smith, 533 F.2d 1077 (8th Cir. 1976).

106. 445 U.S. at 51 (quoting Stein v. Bowman, 13 Pet., at 223).

107. See Benet, supra note 69, at 240 (Though he is talking about the spousal incompetency rules, Benet describes the marital communication privilege stating "...even after a dissolution of marriage by divorce, neither the wife nor the husband is admitted to give any evidence of what occurred during the marriage... Thus one great cause of distrust is removed by making the confidence, which once subsists, ever afterward inviolable in courts of law.")

108. MCM, 1917, para. 213.

109. See supra note 77, and accompanying text.

110. MCM, 1917, para. 213.

111. Id.

112. MCM, 1928, para. 123 b.

113. Id. The exception did not apply to communications overheard by minor children of the parties.

114. MCM, 1951, para. 151b(2).

115. In this case, the interests of an accused in receiving a fair trial were paramount.

116. Id.

117. MCM, 1969, para. 151 b.(The change was in recognition of the earlier Supreme Court decision of Lutwak v. United States, 344 U.S. 604 (1953)).

118.MCM, 1969, para. 151 b.

119. See e.g., supra notes 195-197, and accompanying text.

120. But cf. supra note 237, and accompanying text. (The military courts found several areas in need of interpretation.)

121. Mil. R. Evid. 504. Under this rule, the testimony of an eavesdropper, even an unwilling one, would not be admissable if the communication otherwise met the definition of confidential.

122. See generally, MCM, Analysis M.R.E.

123. A strict interpretation is necessary in order to keep a proper balance between the interest in promoting marital harmony and the interest in administering justice.

124. United States v. Martel, 19 M.J. 917,925 (ACMR 1985).

125. Mil. R. Evid. 1101(b).

126. MCM, Analysis M.R.E. 501.

127. See generally, Woodruff, Privileges Under the Military Rules of Evidence, 92 Mil. L. Rev. 5 (1981).

128. See e.g. supra notes 130-145, and accompanying text.

129. Mil. R. Evid. 504(a).

130. For example, can the wife refuse answer questions of a criminal investigator? How about of a Company Commander? What if a spouse is brought to trial just to be visible. In my experience, attorneys for both sides are often interested in having a witness present at trial, regardless of any testimony that witness may have. For example, a defense counsel would often like the court members to see the wife and children of the accused in the courtroom while making a sentencing argument concerning forfeiture of pay and allowances. Is such an appearance "testimony" that should fall within the privilege?

131. United States v. Hawley, 14 C.M.R. 927 (AFCMR 1954) and United States v. Lee, 31 C.M.R. 743 (AFCMR 1962).

132. United States v. Hawley, 14 C.M.R. 927 (A.F.C.M.R. 1954).

133. Calling the wife would not have helped the interests of justice since the wife admitted that she "would lie, under oath, if necessary, to aid her husband." Hawley, 14 C.M.R. at 932.

134. Id. at 934.

135. Id. citing State v. Winnett, 48 Wash. 93. Winnett was an interesting case in which the government sought to prove that the wife of the accused was pregnant. At trial, a doctor was testifying as to an examination of the wife and, for the alleged purpose of identification, the obviously pregnant wife was brought into the courtroom. The Court noted that "The wife was in reality a witness against him by being brought in sight of the jury where her condition as to pregnancy...could be observed and noted by the jury." Id.

136. Hawley, 14 C.M.R. at 935.

137. United States v. Lee, 31 C.M.R. 743 (A.F.C.M.R. 1962).

138. Lee, 31 C.M.R. at 746.

139. The Court based its finding on the fact that the spouse had no waiver which would have permitted her to testify. Id.

140. 8 Wigmore, supra note 10, § 2243.

141. Mil. R. Evid. 512.

142. Mil. R. Evid. 504(a).

143. United States v. Richardson, 4 C.M.R. 150 (C.M.A. 1952). Cf. United States v. Tipton, 23 M.J. 338 (C.M.A. 1987)(Law to be applied to determine whether husband and wife are legally separated is the law of the state where the parties were domiciled.).

144. MCM, Analysis M.R.E. 501.

145. If the privilege applies to questioning by a Company Commander during an Article 15 hearing, as M.R.E. 1101 implies, it is unlikely that he or she would have the legal resources available to identify

the requirements for a common law marriage.

146. See Mil. R. Evid. 504.

147. See e.g., United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

148. Mil. R. Evid. 504(c)(1).

149. See 8 Wigmore, supra note 10, § 2232.

150. See supra note 18, and accompanying text.

151. See United States v. Parker, 33 C.M.R. 111 (C.M.A. 1963)(Quinn,J. dissenting).

152. See e.g., United States v. Tipton, 23 M.J. 338 (C.M.A. 1987).

153. In cases involving soldiers fraudulently obtaining benefits that they are not actually enitiled to, the marital privileges are very likely to exist.

154. United States v. Tipton, 23 M.J. 338 (C.M.A. 1987).

155. Id. at 343.

156. See Benet, supra note 69, at 241.

157. Mil. R. Evid. 504(c)(2)(A).

158. See 8 Wigmore, supra note 10, § 2239.

159. Unlike the previous versions of the Manual which provided examples. Compare MCM, 1969, para. 148e.

160. United States v. Martel, 19 M.J. 917,925 (A.C.M.R. 1985). But cf. United States v. Tipton, 23 M.J. 338 (C.M.A. 1987)(The Court distinguished the responsibility of a federal court interpreting F.R.E. 501 with that of a military court applying the enumerated military privileges.).

161. E.g. MCM, 1951, para 148e.

162. See e.g. United States v. Driggers, 3 C.M.R. 513 (A.F.C.M.R. 1952).

163. United States v. Francis, 12 C.M.R. 695 (A.F.C.M.R. 1953).

164. Id. at 705.

165. Id.

166. United States v. Strand, 20 C.M.R. 13,20 (C.M.A. 1955).

167. Id.

168. Id. citing United States v. Ryno, 130 F. Supp. 685 (S.D. Cal. 1955) aff'd on other grounds, 232 F.2d 581 (10th Cir. 1956).

169. Id. at 20.

170. The Court used abandonment, holding that the accused's scheme was to induce his wife to believe him dead, amounted to abandonment. Id. at 20.

171. United States v. Wooldridge, 28 C.M.R. 76 (C.M.A. 1959).

172. United States v. Wise, 28 C.M.R. 105 (C.M.A. 1959).

173. Apparently, the Court felt that the Supreme Court did not want the exceptions to the marital privileges to grow any further.

174. 130 F.Supp. 685.

175. Id.

176. 28 C.M.R. at 82.

177. Id. at 82-83.

178. 28 C.M.R. 105 (C.M.A. 1959).

179. United States v. Parker, 33 C.M.R. 111 (C.M.A. 1963).

180. Parker, 33 C.M.R. at 118.

181. Id. at 119, quoting Battalla v. State, 10 N.Y.2d 237.

182. United States v. Massey, 35 C.M.R. 246 (C.M.A. 1965).

183. United States v. Massey, 34 C.M.R. 930 (A.F.C.M.R. 1964).

184. 34 C.M.R. at 937.

185. 34 C.M.R. at 937.

186. Id. at 937.

187. See generally, United States v. Massey, 35 C.M.R. 246, 250-254 (C.M.A. 1965).

188. Id. at 254.

189. Id.

190. The court stated it "cannot set out with exactitude the metes and bounds of the exception...we seek something more than the reprehensibility of the accused's misconduct and the outraged sensibilities of his wife." Id. at 255.

191. Id. at 255-56 (Quinn, J., dissenting).

192. He identified the public policy being served as that of promoting the family relationship. Id. at 256.

193. Such examples included a hearing on a defense objection to the admissability of evidence; a preliminary showing or the voluntariness of a confession; and a hearing to establish the competency of a person to be a witness. Id.

194. He added that "trial judges in the Federal Courts who have considered the specific question have had no apparent difficulty." Id.

195. United States v. Rener, 37 C.M.R. 329 (C.M.A. 1967).

196. Id. at 333. The Court overruled its earlier decision of United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

197. Id. at 332.

198. Id.

199. Id. at 332.

200. While such an assumption was probably not contemplated by the Court in Rener, asserting that the perception stems from not finding an injury to a spouse in cases with similar offenses might have an effect on the judge deciding the issue.

201. Rener at 332.

202. Massey at 256.

203. Cf. Massey, 34 C.M.R. at 937.

204. MCM, 1969, para. 148e. See, Analysis of Contents, Manual for Courts-Martial, United States, 1968 (1969).

205. Id.

206. Id.

207. United States v. Menchaca, 48 C.M.R. 538 (C.M.A. 1974).

208. Judge Quinn did an excellent job of "explaining" the Court's prior decisions. Id., 538-540.

209. Mil. R. Evid. 504(c)(2)(A).

210. Although there is no recognized privilege in the military for other family members, some jurisdictions have extended the privilege to children of the family. See e.g. In re A & M, 61 App.Div.2d 426, 403 N.Y.S.2d 375 (1978) ("(W)e conclude, however, that communications made by a minor child to his parents within the context of the family relationship may, under some

circumstances, lie within the 'private realm of family life which the state cannot enter'").

211. See supra notes 228 - 232, and accompanying text for a discussion of whether a witness spouse may be compelled to testify.

212. Defense counsel have an obvious interest in asserting that a privilege does exist in cases where the spouse who reported the "crime" has had a change of heart by the time of trial.

213. See supra notes 163-169, and accompanying text.

214. Mil. R. Evid. 504(c)(2)(A).

215. See Tipton, 23 M.J. 338.

216. Mil. R. Evid. 504(c)(2)(B).

217. See e.g. Lutwak v. United States, 344 U.S. 604 (1953) (In a case involving individuals executing sham marriages for the sole purpose of gaining admission to the United States under the War Brides Act with the understanding that the marriages would not be consummated and would be followed by divorce, the Court stated that in a "sham, phony, empty ceremony such as the parties went through in this case, the reason for the rule disqualifying a spouse from giving testimony disappears, and with it the rule.").

218. See e.g. MCM, 1969, para. 148e.

219. Mil. R. Evid. 504(c)(2)(B).

220. See e.g., United States v. Richardson, 4 C.M.R. 150 (C.M.A. 1952) and United States v. Groves, 19 M.J. 804 (A.C.M.R. 1985).

221. Mil. R. Evid. 504(c)(2)(B).

222. The most likely scenario for a sham marriage determination would involve a soldier and another person getting married solely to enable them to obtain military benefits, such as medical care. Since both individuals stand to lose if they are found to be in a sham marriage, they would probably be willing to do

whatever is necessary to convince a fact finder that they are now really in love.

223. See Mil. R. Evid. 512.

224. Wyatt v. United States, 362 U.S. 525 (1960).

225. Mil. R. Evid. 504(c)(2)(C).

226. Id.

227. See supra notes 207-215, and accompanying text.

228. United States v. Riska, 33 C.M.R. 939 (A.F.C.M.R. 1963).

229. Id. at 944.

230. Id.

231. A little too adamant in some instances, such as claiming the "rule expressly provides that when such an act is involved a spouse may not refuse to testify". The rule does no such thing. But their pronouncement is nonetheless, accurate.

232. See generally Mil. R. Evid. 104.

233. Mil. R. Evid. 1101 (b).

234. See Mil. R. Evid. 1101.

235. An investigation pursuant to Article 32 is a quasi-judicial proceeding at which the privilege rules apply. See R.C.M. 405(i).

236. E.g. Mil. R. Evid. 505 prevents the disclosure of classified information if such disclosure would be detrimental to the national security and provides detailed guidance as to application of the privilege.

237. United States v. Lovell, 8 M.J. 613 (A.F.C.M.R. 1979).

238. Id. at 614 (She initially called the Office of Special Investigations, but later signed a sworn statement which stated:

(T)hat her husband had come to her early in the evening of the 15th with a small gun in his waistband and dressed in the clothing later described by the victims as being worn by the robber; that he informed her that he was going to "rip off" the barracks; that he returned about 45 minutes later and showed her the fruits of the crime and said, "You didn't believe I'd do it"; that she put everything but the mask in a flour container, and later moved them to a bean container; that she last saw the items approximately two weeks previously; that she checked "last night" and the items were missing from the container. She also related conversations the accused had during the robbery, and described two of the rings and one of the watches.). Id. at 615.

239. Id. MCM, 1969 para. 151(2) would have prevented the wife from testifying as to the numerous admissions the accused had made.

240. Lovell, 8 M.J. at 616.

241. Mil. R. Evid. 1101(d) provides:
These rules (other than with respect to privileges) do not apply in investigative hearings pursuant to Article 32; proceedings for vacation of suspension of sentence pursuant to Article 72; proceedings for search authorizations; proceedings involving pretrial restraint; and in other proceedings authorized under the code or this Manual and not listed in subdivision (a).

242. Tipton, 23 M.J. at 343.

243. See supra notes 130-145, and accompanying text.

244. Elkins v. United States, 364 U.S. 206 (1960).

245. See generally, Bloustein, Group privacy: The Right to Huddle, 8 Rut.Cam. L.J. 219 (1977); Orfield, The Husband-Wife Privileges in Federal Criminal Procedure, 24 Ohio St. L.J. 144 (1963); Note, Circling the Wagons: Informational Privacy and Family Testi-

monial Privileges, 20 Ga.L.Rev. 173 (1985); Note, Questioning the Recognition of a Parent-Child Testimonial Privilege, 45 Albany L. Rev. 142 (1980).

246. But not sucessfully. See, In re Grand Jury Subpoena Issued to Lawrence Matthews, 714 F.2d 223 (2d Cir. 1983).

247. Mil. R. Evid. 501(a)(4).

248. Compare United States v. Guidry, 22 C.M.R. 615,619 (A.C.M.R. 1956) (where the test was not merely one of prejudice, but of substantial prejudice. The test prescribed was "whether, in the event of a rehearing and exclusion of the improperly admitted evidence, the result would probably be more favorable to (the accused)."). Id.

249. United States v. Barnes, 8 M.J. 115,116 (C.M.A. 1979).

250. United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985).

251. Martel at 931. The factors include the nature and scope of the error, whether the trial was before members or judge alone, the comparative strength of the governments case and to what extent, if any, the credibility of the witnesses was affected by the error.

252. Id. at 931.

253. Id.

254. See, United States v. Yzaguirre, 19 C.M.R. 585 (C.G.C.M.R. 1955).

255. Mil. R. Evid. 504(b).

256. See MCM, 1984, Analysis of Military Rule of Evidence 501.

257. This inherent ambiguity is unescapable when trying to define a privilege that has no constitutional or other readily defineable basis.

258. Mil. R. Evid. 504(b)(2).

259. See Martel, 19 M.J. at 925.

260. Mil. R. Evid. 504(b)(2). The Analysis indicates that the defintion used here is similar to that used in Military Rules of Evidence 502(b)(4) and 503(b)(2).

261. See e.g. Martel, 19 M.J. at 926.

262. See, Wolfle v. United States, 291 U.S. 7,14 (1934).

263. Martel, 19 M.J. at 926-928.

264. See e.g., United States v. Turner, 6 B.R. 87 (1934).

265. Mil. R. Evid. 504(b)(1).

266. See United States v. Higgins, 20 C.M.R. 24,33 (C.M.A. 1955)( While addressing the admissibility of letters containing confidential communications, the Court cited para. 151b(2) of MCM, 1951 which provided "the public advantage that accrues from encouraging free communication...is not disregarded by allowing or requiring an outside party who overhears or sees such a privileged communication, whether by accident or design."). Id. at 33.

267. Mil. R. Evid. 504(b)(2). See also MCM, 1984, Analysis of M.R.E. 504.

268. It is likely that this issue can exist in a criminal case. Many of the cases I have seen involved evidence contained in written communications, such as letters between the spouses.

269. See 8 Wigmore, supra note 10, § 2339.

270. United States v. Tipton, 23 M.J. 338 (C.M.A. 1987).

271. Id. at 339.

272. Id. at 345.

273. But see Tipton, 23 M.J. 338. The letters that were admitted were addressed to both the wife and son. The issue was neither raised nor addressed.

274. See Mil. R. Evid. 510.

275. Mil. R. Evid. 504(b).

276. E.g. United States v. Lewis, 433 F.2d 1146 (D.C. Cir. 1970). See also 8 Wigmore, supra note 10, § 2337.

277. Martel, 19 M.J. at 926.

278. 19 M.J. 917

279. Martel, 19 M.J. at 927.

280. Id. at 920.

281. The rules of privilege apply at Article 32 investigations. R.C.M. 405(i).

282. Martel, 19 M.J. at 923.

283. Id. at 926.

284. Id. at 927.

285. Id.

286. Id. at 928.

287. See generally 10 ALR2d 1389.

288. Martel, 19 M.J. at 927.

289. Id.

290. Mil. R. Evid. 504(b)(1).

291. United States v. Richardson, 4 C.M.R. 150,156 (C.M.A. 1952).

292. United States v. Tipton, 23 M.J. 338 (C.M.A. 1987).

293. Id. at 344.

294. See Tipton, 19 M.J. at 343("Setting forth this clear test provides 'the certainty and stability necessary for military justice'").

295. But cf. Macomb, supra note 68, at 116 (When discussing how the spousal incompetency rule applies only to husband and wife, not to parent-child, Macomb states "this doctrine is repugnant to the principle and foundation of evidence...The Roman law, with more wisdom than ours, held such evidence altogether inadmissible.").

296. Tipton, 23 M.J. at 343.

297. Id. at 339. Although this is a rather lengthy discussion, this case is very representative of the type of fact situation where a marital privilege could arise. As the Army Court of Military Review observed over thirty years ago in a similar case, "The facts in this case are neither complex nor, we regret, unique." United States v. Guidry, 22 C.M.R. 615 (A.C.M.R. 1956).

298. Id. at 339-340. Since she was a voluntary witness, the spousal incapacity privilege would not prevent her from testifying. It is unclear whether Miss Heckard was called by the government as a witness. Under a grant of immunity, she could have been compelled to testify since she could not claim the marital privilege.

299. Id. at 340. But he later admitted the letters for a different reason.

300. Id. at 342(citing United States v. Byrd, 750 F.2d 585 (7th Cir. 1984).

301. Id. at 342. It is unclear why the Court even bothered because its decision leaves no room for other courts to apply an exception if there is a permanent separation. Perhaps the Court is advocating a legislative change to the Rule that would give them the authority to apply such an exception.

302. Id. at 343.

303. Cf. United States v. McDonald, 32 C.M.R. 689 (A.C.M.R. 1962).

304. Tipton, 23 M.J. at 343(The Court was acknowledging the drafters' intent in promulgating the Rules).

305. Id.

306. Id.

307. Id. at 344, n.5.

308. E.g. Tipton, 23 M.J. at 344.

309. Id.

310. See 8 Wigmore, supra note 10, § 2340.

311. Mil. R. Evid. 504(b)(3).

312. Id. Does this mean the Government's right to a fair trial is not as important since the evidence is otherwise excluded?

313. Mil. R. Evid. 510(a).

314. See supra notes 260-274, and accompanying text.

315. E.g. United States v. Yzaguirre, 19 C.M.R. 585 (C.G.C.M.R. 1955).

316. The cases usually involve the argument that the accused was forced to take the stand to rebut the improperly admitted testimony of the wife. E.g. United States v. Martel, 19 M.J. 917 (A.C.M.R. 1985).

317. See United States v. Gibbs, 4 M.J. 922 (A.F.C.M.R. 1978).

318. Yzaguirre, 19 C.M.R. 585.

319. 4 M.J. 922 (A.F.C.M.R. 1978).

320. Id. at 923.

321. See Tipton, 23 M.J. at 343.

322. Mil. R. Evid. 510.

323. Walder v. United States, 347 U.S. 62 (1954). (cited in United States v. Trudeau, 23 C.M.R. 246 (C.M.A. 1957)).

324. 23 C.M.R. 246 (C.M.A. 1957).

325. Id. at 247.

326. Id.

327. Id. at 247. It is not clear if the accused objected specifically raising the confidential communications privilege. Regardless, the court raised the issue.

328. E.g. Martel, 19 M.J. at 930.

329. Id.

330. Id.

331. Id. at 930. He discussed these conversations only in response to cross-examination and to questions from the court members.

332. Id. at 930.

333. United States v. Gibbs, 4 M.J. 922,923 (A.F.C.M.R. 1978); Martel, 19 M.J. at 930.

334. See Tipton, 23 M.J. 338. Although it was not addressed by the Court, it was certainly available to them on the facts.

335. Martel, 19 M.J. at 930.

336. Tipton, 23 M.J. at 341.

337. Id. at 345.

338. Mil. R. Evid. 504(c).

339. Mil. R. Evid. 504(c)(2)(A).

340. See supra notes 163-170, and accompanying text.

341. Mil. R. Evid. 504(b)(3)(B).

342. See supra notes 219-222, and accompanying text.

343. See MCM, Analysis M.R.E. 504. Unlike the spousal incapacity privilege, the critical time for a valid marriage is the time when the communication is made,

not when the parties are in court.

344. Mil. R Evid. 504(c)(2)(C).

345. Mil. R. Evid. 504(c)(2)(C).

346. As the Army Court did in Martel, 19 M.J. at 925.

347. E.g. United States v. Clark, 712 F.2d 299 (7th Cir. 1983).

348. Martel, 19 M.J. at 929.

349. Id.

350. Tipton, 23 M.J. at 344.

351. See supra notes 233-243, and accompanying text.

352. United States v. Seiber, 31 C.M.R. 106 (C.M.A. 1961).

353. 31 C.M.R 106.

354. Id. at 107.

355. Id. at 109 (quoting Nardone v. United States, 308 U.S. 338 (1939)).

356. Id.

357. See e.g. Trammel v. United States, 445 U.S. 40 (1980).

358. See supra note 248, and accompanying text.

359. Mil. R. Evid. 402.

360. Tipton, 23 M.J. at 345. The "tone" of the opinion indicates the Court was not pleased with the Government counsel in the case. Why is not apparent. In any case, this displeasure may have had an impact on the Court's finding of error that would not occur in future cases.

361. Id.

362. See e.g. supra notes 142-145, and accompanying text. (A fact finder is required to know the particular State law on common law marriages if the parties claiming the privilege assert such a marriage.)